No. 82-1349
No. 82-1350

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED SCOTTISH INSURANCE CO., *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES), *et al.*,

Respondents.

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

DAVID S. SHRAGER, *President*
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
1160 Suburban Station Building
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103
(215) 568-7771

MARC S. MOLLER
Counsel of Record
DONALD I. MARLIN
KREINDLER & KREINDLER
99 Park Avenue
New York, New York 10016
(212) 687-8181

Attorneys for *Amicus Curiae*
The Association of Trial Lawyers of America

Washington, D.C. • THIEL PRESS • (202) 638-4321

QUESTION PRESENTED

The Association of Trial Lawyers of America will address the following question:

Whether negligence in the inspection of an aircraft to determine its safety and airworthiness by Federal Aviation Administration employees or delegates is actionable under the Federal Tort Claims Act?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases cited: Page

Statutes:

Other Authorities:

No. 82-1349
No. 82-1350

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG ARILINES), ET AL.
RESPONDENTS

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Association of Trial Lawyers of America is a voluntary, nationwide organization of over 55,000 members, including several hundred in Canada and other foreign countries. Its

membership includes judges and law teachers, but primarily consists of lawyers who specialize in litigation, and particularly in the representation of plaintiffs in civil cases involving injuries and death to people and damage to property.

The men and women of the Association are pledged to the preservation of the American legal system, the protection of individual rights and liberties, and the evolution of the common law. Through its appropriate officers and committees, the Association has authorized participation in this case as amicus curiae. This brief is filed with the written consent of all the parties.

The Association is concerned with this action, because the decision in this case will have an immediate effect on similar cases that may now be pending throughout the country as well as on the development of legal doctrine.

The Association files this Brief in support of respondents' position that the negligent inspection of aircraft is actionable under the Federal Tort Claims Act.

STATEMENT OF THE CASE

In these consolidated cases, the common question presented concerns the liability of the United States under the Federal Tort Claims Act (FTCA) 28 U.S.C. 1246, 2671-2680, for the operational negligence of its employees in performing inspection activities voluntarily undertaken by the Government. The plaintiffs in these cases are owners and passengers of aircraft and the negligence is that of Federal Aviation Administration employees or delegates who inspected aircraft and evaluated and approved aircraft design. The subject aircraft were negligently found to be airworthy and to have met minimum safety

requirements when in fact they were not airworthy and were unsafe.

In United States v. United Scottish Insurance Co., No. 82-1350, a DeHavilland Dove caught fire and crashed as a result of a defective and faulty fuel line. The particular fuel line was not adequately clamped and contained a faulty connection. When exposed to normal aircraft vibration, the defective fuel line allowed gasoline to leak and ignite. The gasoline line and heater had been separately added to the plane in 1966.

After its installation, the FAA inspected the line and heater and issued a Supplemental Type [airworthy] Certificate, but negligently failed to detect the potentially deadly defect in the design and installation. After trial, and the taking of additional testimony on remand, the District Court found the negligent inspection of the United States to be the

proximate cause of the injury to the aircraft owner and passengers. The Court explicitly found that both the owner and passengers had relied upon the careful performance of an inspection by the FAA. On appeal, the Ninth Circuit affirmed the judgment of the district court.

In United States v. Varig Airlines, No. 82-1349, a 707 jet airliner crashed as a result of an in-flight fire in an aft bathroom. The genesis of the fire was a trash disposal container whose design did not meet minimum standards. Both the manufacturer's design plans, and the particular aircraft itself, had been inspected by the FAA and certified as airworthy. The District Court granted the government's motion for summary judgment on the ground that negligent certification was not actionable. The Ninth Circuit reversed and reinstated the complaint.

SUMMARY OF ARGUMENT

It is well established that the United States is liable under the Federal Tort Claims Act (FTCA) for the operational, non-policy level negligence of its employees. The theory of liability in these actions -- negligent performance of an operational level inspection conducted to determine whether an aircraft is safe -- is a recognized aspect of the common law Good Samaritan doctrine. It falls squarely within the scope of decisions of this Court applying the Good Samaritan rule in FTCA suits.

Under the FTCA, the government may be cast in damages for its negligent acts "like any private individual." Although the Government contends that inspection of aircraft for safety and airworthiness is a "uniquely" governmental function, that does not preclude liability for negligence in carrying out that

activity. This Court has repeatedly refused to carve out a "governmental function" exception to the FTCA which would override liability for misfeasance or nonfeasance in uniquely governmental roles. The United States has been held liable for negligence in a variety of uniquely governmental services, such as firefighting, air traffic control and even prison operation.

At the same time, the "Good Samaritan" doctrine, which common law courts have routinely applied to negligent inspections of property, applies with special force to negligent inspection of an aircraft. By legislation, regulations and pre-emptive activity, the government has occupied the field of aircraft inspection and certification. In doing so, it has fostered justifiable and reasonable reliance by aircraft owners and the public upon careful performance of an activity aimed

at public safety. Indeed, it is these "safety" inspections which underlie the public's perception that aircraft manufactured in the United States are safe and reliable and that they do not incorporate design features which will compromise safety of flight.

Neither the "discretionary" function or the "misrepresentation" exceptions override the general liability provisions of the Tort Claims Act. As the Solicitor General has conceded, and as this Court has recently ruled in Block v. Neal, 51 U.S.L.W. 4237 (1983), the misrepresentation exception is inapplicable to a claim of negligent inspection. And, as the decisions of this Court plainly hold, the discretionary function exception is not applicable to operational negligence.

The judgments of the Ninth Circuit are thus entirely in harmony with the governing

decisions of this Court and should be affirmed.

POINT I

THE GOVERNMENT IS LIABLE FOR CONDUCTING NEGLIGENT SAFETY INSPECTIONS OF AIRCRAFT

Although the liability of the United States for negligent inspection of aircraft has not been addressed by this Court, the principles articulated in prior decisions make it manifest that the United States is liable for negligence in that activity.

a. Negligent Inspection of Aircraft by Government Employees or Delegates is Actionable Under the Federal Tort Claims Act

Decisions of this Court have firmly established the principle that the government is liable for negligence under the FTCA, even when it claims to be acting in a "uniquely"

governmental or regulatory capacity. Indeed, the prime contention of the government here -- that it cannot be liable for uniquely governmental or regulatory conduct since it can only be responsible for actions as a private person -- was definitively rejected by this Court as long ago as 1955.

In Indian Towing Co. v. United States, 350 U.S 61 (1955), where the United States was cast in damages for the negligent operation of a lighthouse, it urged before this Court that there was no FTCA liability "for negligent performance of 'uniquely governmental functions.'" Id., at 64. In rejecting that interpretation of the FTCA, the Court declined to be drawn "into the 'non-governmental' -- 'governmental' quagmire that has long plagued the law of minicipal corporations..." or to adopt a rule that would require "distinctions so finespun and capricious as to be almost

incapable of being held in the mind for adequate formulation." Id. at 65, 68.

That same year, with just a citation to Indian Towing, this Court affirmed a judgment against the United States for negligence of air traffic controllers in regulating air traffic. United States v. Union Trust Co., 350 U.S. 907, aff'g sub. nom., Eastern Airlines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955). As the citation to Indian Towing reflects, this Court again rejected the contention of the government that since it was acting in a unique governmental role as a regulator of air traffic it could not be liable.

This Court reiterated the import of Indian Towing in Rayonier, Inc. v. United States, 352 U.S. 315 (1957), where the United States was sued for the negligence of its Forest Service firefighters. Rejecting the

lower courts' reliance upon the principles of municipal corporation law -- which hold that a municipality that undertakes to provide a service owes a duty to the public at large and not an actionable duty to any particular individual -- the Court emphasized:

> We expressly decided in Indian Towing that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity.

Id. at 319.

Most importantly, the Rayonier Court brushed aside the spectre of "novel and unprecedented" liability forecast by the government, pointing out that "the very purposes of the Tort Claims Act was to ... establish novel and unprecedented governmental liability."

As to the government's admonition that "a heavy burden may be imposed on the public treasury," the Court responded:

> Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden of each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees. And for obvious reasons the United States cannot be equated with a municipality, which conceivably might be rendered bankrupt if it is subject to liability for the negligence of its firemen. There is no justification for this Court to read exemptions into the Act beyond those provided by Congress.

Id. at 320.

More recently, in United States v. Muniz, 374 U.S. 150 (1963), the FTCA was held applicable to allow claims of negligent supervision

and medical malpractice by prisoners against the United States for the actions of federal prison employees. Again relying upon Indian Towing and Rayonier, the Court succinctly summarized the governing principles: "The Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well." Id. at 159.

Neither the government's allegation here that aircraft inspection is a governmental regulatory activity, nor its articulated concern for the alleged public fisc consequences of permitting negligent inspection actions thus provide any basis for carving out a new exception to the FTCA. Indeed, the government's attempt to cloak itself in the garb of a municipal corporation -- and claim that it

owed no duty to any particular individual because it owed a duty to the public at large -- is unavailing under the FTCA.

As long as the general principles of applicable state law would allow recovery for the negligence at issue against a private person -- as they plainly do here -- the alleged "governmental" nature of the conduct does not bar recovery.[1]

b. Negligent Inspection is a Recognized Aspect of the Good Samaritan Doctrine

As a general matter of tort law, there can be little question that an individual who retains an inspection company to inspect property, be it a house, an automobile or an aircraft, may recover for losses sustained if the

---

[1] In any event, it is plain that inspection of property and mechanical devices is an activity engaged in by private entities as well as governmental. As the trial court concluded, prior to 1926 inspection of aircraft was wholly in private hands.

inspection is performed in a careless fashion. See, e.g., Hartford Steam Boiler Inspection & Insurance Co. v. Pabst Brewing Co., 201 F. 617, 629-634 (7th Cir. 1912). When the government voluntarily places itself in the position of inspector, there is simply no justification for declining to impose the same measure of liability and responsibility -- a duty to act with reasonable care. That is the very essence of the Good Samaritan doctrine.

In fact, negligent inspection of property is one of the examples cited by the Restatement of Torts (Second) as a classic illustration of the Good Samaritan rule.[2] Negligent

---

[2] Restatement of Torts (Second) § 324A, illustration 4:

> A Company employs B Company to inspect the elevator in its office building. B Company sends a workman, who makes a negligent inspection and reports that the elevator is in good condition. Due to defects in the elevator, which a proper inspection would have

(footnote continued)

inspection liability is traditionally imposed upon one who performs a safety inspection, without regard to whether the inspector also had an obligation to perform maintenance or repair services. The voluntary performance of the inspection itself, and not any "guarantee" that the property would be maintained in a safe condition, provides the foundation for Good Samaritan liability. Restatement (Second) of Torts, § 324A, illustration 4; Hartford Steam Boiler Inspection & Insurance Co. v. Pabst Brewing Co., 201 F. 617, 629-634 (7th Cir. 1912) (insurance company undertook to inspect to determine safety compliance; no obligation to repair or maintain), Van Winkle v. American Steam Boiler Co., 52 N.J.L. 240, 19 A. 472 (1890) (insurance company inspected

---

(footnote continued from previous page)
disclosed, the elevator falls and injured C, a workman employed by A Company. B Company is subject to liability to C.

for safety; no undertaking to repair or maintain); Evans v. Otis Elevator Co., 403 Pa. 13, 168 A.2d 573 (1961) (liability for failure to properly inspect); McDonnell v. Wassenmiller, 74 F.2d 320 (8th Cir. 1934) (engineer undertook to inspect and oversee construction for compliance with design; liable for failing to discover construction impropriety).

It is upon the basis of the Good Samaritan doctrine that this and other Courts have imposed liability for the negligence of air traffic controllers. E.g., United States v. Union Trust Co., 350 U.S. 907, supra; Ross v. United States, 640 F.2d 511, 519 (5th Cir. 1981); Freeman v. United States, 509 F.2d 626, 629 (6th Cir. 1975); Ingham v. Eastern Airlines, Inc., 373 F.2d 227, 236 (2d Cir. 1967). Had the airline industry itself undertaken to organize and retain a contractor to provide air traffic control services, the contractor

would be obliged to act with due care. Once the government voluntarily interposes itself into the situation, and engenders reliance by aircraft owners, pilots and the traveling public, it also becomes obligated to refrain from negligence -- a minimal level of responsibility to be sure. E.g., Ross v. United States, 640 F.2d at 519; Ingham v. Eastern Airlines, Inc., 373 F.2d at 236.[3]

Those same considerations dictate the imposition of liability upon the United States for negligent inspection. Indeed, in many respects negligence on the part of an air traffic controller is akin to negligence on the part of an aircraft inspector: like an inspector, a controller acts as a trained

---

[3] In a similar vein, when the government undertakes to operate lighthouses, or provide fire protection services, it also becomes duty bound to exercise reasonable care in the provision of those services and is held liable for its failure to do so. E.g., Indian Towing; Rayonier.

observer and reporter of the safety of conditions, such as weather and air traffic. When the controller carelessly observes or carelessly reports, he or she is negligent. E.g., Stork v. United States, 430 F.2d 1104 (9th Cir. 1970); Eastern Airlines v. United Trust Co., 221 F.2d at 78. The government is then liable to the pilot who relied on the specific conduct of the controller, as well as the passengers who generally rely upon the careful performance of the duty. E.g., Indian Towing, supra, (damages sustained by vessel owner); United States v. Union Trust Co., supra, (passengers); Ross v. United States, supra, (pilots and passengers); Stork v. United States, supra, 430 F.2d at 1108 (pilots specific reliance entitles passengers to maintain action).

It is plain that an inspection of property, whether performed by the government or a

private party, creates the type of reliance necessary to sustain a Good Samaritan claim. The owner of the inspected property justifiably relies upon the government inspection,[4] and continues to use defective property, without seeking or obtaining the necessary remedial steps and without knowledge of a potential or actual danger. The passenger's reliance is his or her conduct in entering into the aircraft, conduct necessarily undertaken in reliance upon the careful performance of required safety inspections.[5] It is that

---

[4] The Government seems to suggest that no individual has a right to rely upon FAA inspections, contending that the aircraft owner has the "prime" responsibility to ensure safety. If the Government is suggesting that each owner must conduct his or her own minute inspection of all aircraft design components and systems immediately after an FAA inspection, then it is saying that all FAA inspections are purposeless and meaningless, a proposition directly refuted by the applicable statutes and regulations, as well as the Trial Court's findings of fact in United Scottish.

[5] To the passenger of an aircraft, or an (footnote continued)

precise type of reliance that was the predicate for common law recognition of a negligent inspection action pursuant to the Good Samaritan rule. See, e.g., Hartford Steam Boiler Inspection & Insurance Co. v. Pabst Brewing Co., 201 F. 617, 629-634 (7th Cir. 1912); Van

---

(footnote continued from previous page)
elevator for that matter, the very act of boarding is necessarily conduct in reliance upon a careful inspection, without regard to whether the passenger has a conscious appreciation of the fact that an inspection was conducted or is aware of who performed it. See Restatement (Second) of Torts § 324A, illustration 4. In fact, a passenger in that situation simply has no way to avoid the consequences of a negligent inspection.

In other situations, by contrast, such as where the government or a private entity has undertaken to warn of a danger by operating a lighthouse or posting a railroad crossing guard, reliance is not possible unless there is first a conscious awareness by the victim that someone has undertaken to warn. See Restatement (Second) of Torts, § 324A, illustration 5. In the latter situation, absent a conscious awareness of the warning, the individual should, and is able to, exercise care for himself or herself. Conscious awareness of the voluntary undertaking is thus a necessary element only when reliance is not possible without such awareness.

Winkle v. American Steam Boiler Co., 52 N.J.L. 240, 19 A. 472 (1890); McDonnell v. Wasenmiller, 74 F.2d 320 (8th Cir. 1934) (engineer who had duty to inspect steam line for compliance with design and proper construction liable for negligence to an individual injured by escaping steam). It is also that exact type of reliance that forms the predicate for the rulings of this and other Courts allowing aircraft passengers to recover from the government for the negligence of an air traffic controller. E.g., United States v. Union Trust Co., 350 U.S. 907, supra.

It is thus surprising that the Government would take issue with the existence of actual reliance in the circumstances here. A review of the opinions of the Courts below in United Scottish reveals that the Ninth Circuit specifically endorsed the district court's "holding that the victims relied on the F.A.A.

inspection," 692 F.2d at 1209.[6] In turn, the district court explicitly found as a fact both that "[p]laintiff John W. Dowdle, Jr. [the owner of the aircraft] specifically relied upon the inspection of the aircraft herein" and that each individual passenger likewise relied upon the inspection. (Findings of Fact 31, 32, 35, 62, 63, 64, 72).

The government is simply incorrect, then, in its suggestion that the Ninth Circuit dispensed with the reliance element of the claim in conflict with other circuits.[7] To the

---

[6] The Ninth Circuit, in addition to noting the finding of actual reliance, went on to point out the government could have reasonably anticipated that reliance. 692 F.2d at 1211.

[7] The cases cited by the government in any event are inapposite. In Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978), for instance, the government was sued for failing to conduct any inspection in the first instance and not for a negligent inspection which it had voluntarily undertaken. The issue there thus was whether any duty existed to inspect at all, an entirely different questions than that (footnote continued)

contrary, the Court expressly required reliance, and there are factual findings which are more than ample to supply the type of reliance necessary here.

Finally, the governing state law without question recognizes Good Samaritan liability. In fact, a situation strikingly similar to the one here was involved in two of the California Supreme Court cases which applied the Good

---

(footnote continued from previous page)
posed here, which is whether the government owes a duty to use due care once it undertakes an inspection.

Likewise, in Rayonier v. United States, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982), there was no reliance upon a negligent inspection. Rather, the inspector there merely granted an extension of time to correct known defects. As the court concluded, the equipment "was not shown to have any defects which were known to the inspectors but hidden from the decedents ..." 660 F.2d at 1143. Finally, in Gelley v. Astra Pharmaceutical Products, Inc., 610 F.2d 558 (8th Cir. 1979) the court merely concluded that no claim was stated and no duty was owed under Minnesota Municipal corporations law, a rather unique conclusion justified by the fact that Minnesota treats municipal corporations as private persons. 610 F.2d at 561.

Samaritan rule, Coffee v. McDonnell Douglas Corp., 8 Cal.3d 551, 503 P.2d 1366 (1972), and Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013 (1932).[8] In Coffee, an employer who was under no duty to do so provided a physical examination for a prospective employee, the plaintiff. The purpose of the examination was not to render treatment, but to determine the plaintiff's fitness for employment, and thus was analogous to a safety inspection of property.

The employer negligently failed to become aware of and to report to the plaintiff findings which indicated the presence of bone cancer. Of course, the plaintiff relied upon the examination and refrained from seeking the needed corrective action -- medical treatment -- precisely like a property owner and others

---

8 Accord, e.g., Schwartz v. Helms Bakery, Ltd., 67 Cal.2d 232, 238, 430 P.2d 68 (1967) ("he who undertakes to do an act must do it with care").

rely upon a negligent inspection and refrain from seeking mechanical correction.

Applying the Good Samaritan doctrine, the California Supreme Court upheld the cause of action against the employer for the negligent examination. Likewise, the Dahms case imposed liability on a company for negligent inspection that led to the injury of a person using an elevator. The California Courts have thus upheld Good Samaritan claims exactly akin to negligent inspection.

In sum, the negligent inspection theory is but a classic illustration and application of the Good Samaritan doctrine adopted by this and other Courts as a basis for the imposition of FTCA liability. No reason has been shown, and indeed there is none, for overriding that principle in the present setting.

POINT II

NEITHER THE MISREPRESENTATION NOR THE DISCRETIONARY FUNCTION EXCEPTIONS ARE APPLICABLE

a. Misrepresentation

As the Solicitor General now concedes, and this Court recently held, the misrepresentation exception to the Tort Claims Act, 28 U.S.C. § 2680(h), does not bar a Good Samaritan claim for negligent inspection of property. Block v. Neal, 103 S. Ct. 1089 (1983).

Under the plain import of Neal, the misrepresentation exception bars an action only insofar as it seeks recovery exclusively based upon a misrepresentation of fact, and involves a claim in the nature of the common law action of deceit. 51 U.S.L.W. at 4239-4240, and n.5. It does not preclude claims premised upon other conduct, such as the failure to exercise due care in conducting an inspection, even though reliance and a "generic misrepresenta-

tion" may be incidentally involved. Id. at 4240 and n.7. Inasmuch as the claims here are squarely premised upon a negligent inspection -- and not a misrepresentation akin to the common law action of deceit -- the misrepresentation exception is of no moment.

b. Discretionary Function

In evaluating a claim of discretionary function, it is first necessary to isolate the conduct which is the gravamen of the lawsuit. See, e.g., 28 U.S.C. § 2680(a); Dalehite v. United States, 346 U.S. 15 (1953). It is at that initial point that the government's invocation of the discretionary function exception falters. For, there is nothing more at issue here then the garden-variety operational negligence of an employee in conducting an inspection.

It is now settled that the discretionary function exception applies only to political or policy judgments made at a planning rather than an operational level. Dalehite v. United States, supra, at 42; Driscoll v. United States, 525 F.2d 136 (9th Cir. 1975); United States v. Union Trust Co., 350 U.S. 907, supra; Ingham v. Eastern Airlines, Inc., 373 F.2d at 238, supra. As one Circuit explained, there is a fundamental basis for the distinction:

> The discretionary function exception does not insulate the Government from liability for all mistakes of judgment of its agents, but only for significant policy and political decisions, the types of governmental decisions which should not be circumscribed by customary tort standards. The word "discretion" in a statute is not used in a weak sense to mean "judgment" or "discernment" but rather in the strong sense to mean that an official has the "power of free decision" and is not bound by tort standards set by another authority such as a court.

Miller v. United States, 583 F.2d 857, 866, (6th Cir. 1978). In a variety of circumstances, the day-to-day activities of employees whose role it is to apply and implement existing standards, rules and regulations have been held not to be discretionary functions.[9]

The government does not seem to claim that the ordinary activities of an inspector -- who applies existing policies and judgments rather than initiating or making them -- is anything other than operational activity. Nor could it, in view of this Court's explicit recognition in Indian Towing v. United States, 350 U.S. at 62, 64, that the failure to properly inspect or repair a lighthouse occurred

---

[9] E.g., Indian Towing v. United States, 350 U.S. at 62, 64 (negligent inspection and failure to repair government lighthouse is conduct at operational level); Madison v. United States, 679 F.2d 736, 741 (8th Cir. 1982) (once decision is made by government to conduct inspections, implementation of that decision occurs at operational level).

at the operational level of governmental activity.

Instead, the government endeavors to shift the focus away from the specific facts of the case -- where under applicable regulations the government was undisputedly required to inspect, negligently carried out that function, and failed to discover a specific defect -- to the larger question whether it should be required to discover every defect in every aircraft and become an insurer of aircraft safety.

The government's position effectively amounts to a reiteration of its substantive position that it owes no duty to "guarantee" the safety of an aircraft. Aside from the fact that the precise argument was made and rejected in Indian Towing,[10] that position

---

[10] In Indian Towing, where liability was imposed for failure to inspect or repair a lighthouse, the Solicitor General had urged (footnote continued)

entirely misses the point. The government here is not being held liable for failing to "guarantee" the safety of an aircraft, nor is it being held liable for failing to discover every defect in every aircraft. It is responsible, however, for the carelessness of an employee in conducting an inspection which the government voluntarily obligated itself to perform and for not discovering a specific and expressly prohibited unsafe condition.

The basis for that Good Samaritan liability is not any contractual or other undertaking by which the inspecting party "guarantees" safety. Instead, the basis of liability is the unmistakable fact that the government voluntarily made a decision to inspect aircraft and then implemented that decision in a

---

(footnote continued from previous page)
the precise argument again offered by United States: "In undertaking to provide aids to navigation, the United States does not act as a guarantor or an insurer of their faultless performance." 100 L.E.d. at 52.

negligent fashion. Had the government employees implemented the decision in a proper and careful manner, the defect would have been discovered by the person whose duty it was to discover it, and the accident avoided entirely. Just as in Indian Towing, there need have been no guarantee of safety, but only an exercise of ordinary care to prevent the tragedies that occurred here. Obviously, then, there is involved here no question of policy judgments concerning the proper role of the FAA in the scheme of aviation regulation, and no exercise of discretion.

Finally, in a very real sense, the government's argument would afford a sweeping breadth to the discretionary function exception. In effect, the government is contending that whether it may be held liable for the consequences of its actions is a discretionary judgment, i.e., it is for the FAA to decide,

as a discretionary matter, whether it will undertake to "guarantee" safety.

Under that line of reasoning, even though the government undertakes to perform a particular act, and even though as a legal consequence it becomes obligated to act with due care, it cannot be held liable for negligence because it did not make a "policy decision" to "guarantee" safety. Of course, that approach would run roughshod ever virtually every ordinary FTCA negligence action. In almost every instance of operational activity, it may be urged that there is an underlying discretionary judgment as to the proper scope of liability for negligent performance of that activity. No authority cited by the United States even suggests that the discretionary function exception should be afforded so unlimited a reach.

However viewed, then, the negligent actions of an FAA inspector cannot be talismanically transformed into a planning level policy or political judgment.

CONCLUSION

Settled principles of law largely govern disposition of these cases. Most fundamentally, there is no "governmental" function exception to the Federal Torts Claims Act for "regulatory" or sovereign activity. Under the Good Samaritan doctrine, the Government becomes duty bound to exercise due care once it decides to act at all. Those principles -- which result in the imposition upon the government of the normal, minimal obligation of reasonable care owed by private persons -- validate the negligent inspection theory of liability. In any particular instance, of course, the fact of negligence must be proven

to the satisfaction of a trial judge before application of the theory will result in recovery.

Nor does the discretionary function exception bar recovery for the negligent inspections at issue. At bottom, the careless actions of an FAA employee in conducting an inspection cannot be transformed into planning level political or policy judgments. An employee carrying out and implementing regulations and standards is, as this and the other Court's have concluded, acting at the operational level.

In each case, therefore, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

MARC S. MOLLER*
DONALD I. MARLIN

KREINDLER & KREINDLER
99 Park Avenue
New York, NY 10016
(212) 687-8181

DAVID S. SHRAGER
President, The Association
of Trial Lawyers of America
1160 Suburban Station
Building
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103
(215) 568-7771

Attorneys for Amicus Curiae
The Association of Trial Lawyers of America

*Counsel of Record

CERTIFICATE OF SERVICE

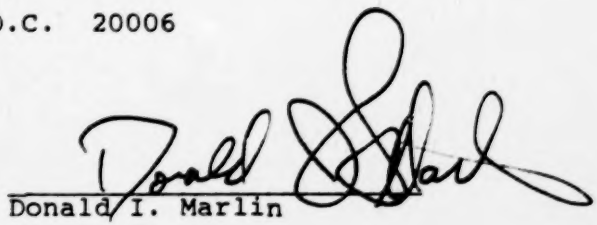
Donald I. Marlin, an attorney for Amicus Curiae and a member of the Bar of this Court, certifies that on the 14th day of October, 1983, copies of the foregoing Brief were served by mail upon all parties required to be served:

The Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Richard F. Gerry, Esq.
110 Laurel Street
San Diego, CA 92101-1486

Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Smiley, Olson & Gilman
1815 H Street, N.W.
Suite 100
Washington, D.C. 20006



Donald I. Marlin